

# A COMPARATIVE STUDY ON THE REGULATION OF LABOUR BROKERS IN SOUTH AFRICA AND NAMIBIA IN LIGHT OF RECENT LEGISLATIVE DEVELOPMENTS\*

ABOTES<sup>†</sup>

Lecturer, North West University, Potchefstroom Campus

*In an attempt to remedy the lack of proper regulation of labour brokers, the South African government has amended the Labour Relations Act 66 of 1995, especially s 198. The amendments have now reached a point where they have the potential to provide better protection for the parties involved, and to provide a higher degree of legal certainty. Meanwhile the Namibian Labour Amendment Act of 2012 introduced provisions for the regulation of labour brokers in a redrafted s 128. This is a drastic change from the total ban of labour broking in the previous version of s 128 of the Namibian Labour Act of 2007. This article undertakes a comparison between the amendments to the South African legal position on labour brokers and the regulations currently contained in the new Namibian Labour Amendment Act of 2012. It investigates to what extent these respective instruments differ from each other, and how the provisions in the Namibian Labour Amendment Act could have influenced the regulation of labour brokers in South Africa.*

## I INTRODUCTION

During the past few years, amendments to some of the most prominent South African labour legislation have been the main topic of discussion among labour law experts. Changes to the Labour Relations Act 66 of 1995 ('the LRA'), the Basic Conditions of Employment Act 75 of 1997 ('the BCEA') and the Employment Equity Act 55 of 1998 ('the EEA') have been made. Although various areas of labour law are affected, these amendments impact the atypical employment industry the most. This is not an unexpected turn of events in light of the numerous papers published by academics and legal practitioners about the lack of adequate regulation of these forms of employment.<sup>1</sup> Needless to say, the lack of proper regulation has led to a

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<sup>†</sup> LLB LLM LLD (North West).

<sup>1</sup> E S Fourie 'Non-standard workers: The South African context, international law and regulation by European Union' (2008) 4 *PELJ* 110; J Geldenhuis 'Reasonable expectations: Real protection or false security for fixed term employees?' (2008) 20 *SA Merc LJ* 268; P A K le Roux 'Labour brokers and non-standard forms of employment' (2009) 19(3) *Contemporary Labour Law* 21; J Theron 'Employment is not what it used to be' (2003) 24 *ILJ* 1273; B P S van Eck 'Temporary employment services (labour brokers) in South Africa and Namibia' (2010) 13(2) *PELJ* 107; J Theron 'Intermediary or employer? Labour brokers and the triangular employment relationship' (2005) 26 *ILJ* 642; M Olivier 'Extending labour law and social security protection: The predicament of the atypically employed' (1998) 19 *ILJ* 673.

degree of exploitation of the employees involved in atypical employment.<sup>2</sup> The absence of specific rules on how to deal with certain forms of atypical employment gave employers the freedom to manage the relevant relationship as they saw fit (within the broad terms of the right to fair labour practices), and this sometimes left the employees vulnerable. This fact was confirmed by the words of the former Minister of Labour, Membathisi Mdladlana, during the 19th Annual Labour Law Conference that was held on 6 July 2006. He said:

‘In light of the burgeoning practice of using atypical workers who find it difficult to exercise their rights, I am of the view that the labour law should cushion and mitigate the adverse nature of atypical forms of employment and lack of protection for these workers. Just as a new born baby, who is vulnerable and needs protection from the mother, so too will these vulnerable workers receive the adequate protection and guarantees from the government in their pursuit for decent work.’<sup>3</sup>

From an early stage, it was clear that the South African labour legislation was not nearly adequate to provide protection for atypical forms of work, and that the amendment of labour law legislation, in order to fill this void, was imminent. One of the forms of atypical employment not adequately covered by legislation was the services provided by temporary employment agencies (commonly known as ‘labour brokers’). On the one hand, the Industrial Conciliation Act 28 of 1956 (renamed the Labour Relations Act 28 of 1956) merely provided a definition for labour brokers, by stating that they were ‘businesses providing clients with persons to perform work for the client at a fee, where such persons are paid by the broker’. On the other hand, the 1995 LRA attempted to regulate labour brokers to some extent by including s 198 within its framework. The 1995 LRA also provided a definition for temporary employment services, but with a broader formulation. It defined a temporary employment service as a person ‘who, for reward, procures for or provides to a client other persons who render services to, or perform work for, the client and who are remunerated by the temporary employment service’. Other than the definition, however, the 1995 LRA contained very few provisions regarding the organisation of labour brokers.<sup>4</sup>

Section 11 of the Private Employment Agencies Convention of 1997 places an obligation on the member states of the International Labour Organisation (‘ILO’) (of which South Africa is one) to take steps to implement instruments to protect employees involved with employment agencies. In addition, there has been pressure both from trade unions

<sup>2</sup> Employers make use of labour broker employees in order to save expenses, to avoid labour legislation (as the labour broker is considered the employer and therefore the party responsible for complying with employer obligations), and to be able to let the employee go without having to comply with fair dismissal procedures.

<sup>3</sup> M M S Mdladlana ‘Labour law in the next decade: Time for a change?’ available at <http://www.info.gov.zaspeeches200606070716451003.htm>, accessed on 14 December 2012.

<sup>4</sup> These provisions will be discussed briefly below.

(demanding the total ban of labour brokers) and employer organisations (which argue in favour of the continued existence of labour brokers, with proper regulation). As a result, the South African government has attempted since 2010 to amend some of the labour legislation. The aim was, among other aspects, to resolve the issue of insufficient regulation of temporary employment services with the aim of avoiding exploitation of the relevant employees. A discussion of the adopted amendments will be provided below.

While the South African government attempted to regulate labour brokers in the previous s 198 of the LRA, albeit meagrely, the Namibian government officially did not recognise labour brokers within its prior legislation. Namibia's first official labour statute, the Namibian Labour Act of 1992, made no mention of labour brokers. However, s 126 of the (once proposed) Namibian Labour Act of 2004 did contain various aspects regarding this industry. It provided a definition for labour brokers, much like the definition in s 198 of the current LRA, but added that the client could also be the party remunerating the employee.<sup>5</sup> Section 126 indicated that the labour broker was to be the employer of the employee<sup>6</sup> and, in addition, provided for joint and several liability of the client and the labour broker under certain circumstances.<sup>7</sup> The section went on to state that the employees may not be offered conditions of employment less favourable than those provided for by the Act.<sup>8</sup> Subsection 5 further provided for the status of the employees. Here, it was stated that for all intents and purposes, the employee of the labour broker would be considered to be an employee, in spite of the sporadic nature of his or her employment.<sup>9</sup> Finally, subsec 6 provided sanctions for the contravention of the provisions contained in this section. A labour broker could be liable to a maximum fine of N\$50 000 or imprisonment for a period not exceeding two years. These penalties could even be imposed concurrently, depending on the circumstances of the contravention.

Unfortunately the Namibian Labour Act of 2004 was never promulgated, due to the inability of the social partners to reach consensus with regard to some of the proposed provisions. As a result, labour brokers in Namibia continued to operate without regulation, and labour broker employees remained vulnerable to exploitation. In 2007, the Namibian government endeavoured to resolve the issues associated with labour brokers, not by regulating them, but by banning them altogether in terms of s 128 of the

<sup>5</sup> Section 126(1) of the Namibian Labour Act of 2004.

<sup>6</sup> Section 126(2) of the Namibian Labour Act of 2004.

<sup>7</sup> Section 126(3) of the Namibian Labour Act of 2004.

<sup>8</sup> Section 126(4) of the Namibian Labour Act of 2004.

<sup>9</sup> Generally, the employee would be placed under the control of a specific client for a temporary period while performing prescribed services. After the period has lapsed, the employee would return to the labour broker to await a new placement. It is possible however, that the employment could have the appearance of a permanent arrangement, as an employee might be placed with a specific client for an extended period of time. This *temporary* employment could stretch over a period of several years, depending on the needs of the client.

Namibian Labour Act of 2007. This was, however, short lived as Africa Personnel Services (now Africa Labour Services ('ALS')), the largest labour broker in Namibia, claimed that this provision was unconstitutional because it limited their right to carry on any trade or business of their choice as envisaged in s 21 of the Constitution of Namibia.<sup>10</sup> In 2009, the Supreme Court of Namibia upheld ALS's claim and struck down s 128 as being unconstitutional.<sup>11</sup> Accordingly, there was a need for new legislation to regulate labour brokers. In 2012, after a lengthy process, the Namibian government finally promulgated new labour legislation which provides specifically for labour brokers. This legislation closely resembles some of the provisions in the proposed Namibian Labour Act of 2004. However, in terms of the Namibian Labour Amendment Act of 2012 (effective August 2012), the client is considered to be the employer.

The main aim of this article is to discuss the relevant amendments to the 1995 LRA introduced by the Labour Relations Amendment Act 6 of 2014, which came into force on 1 January 2015, as well as how the newly promulgated legislation in Namibia relating to labour brokers compares to it. It is possible that some of the provisions contained in the new Namibian legislation could have proven to be useful in developing a workable model for South African law.

## II PREVIOUS SOUTH AFRICAN PROVISIONS

As I have stated above, the 1995 LRA provided a definition for labour brokers in s 198, from which it can be deduced that a triangular employment relationship comes into being when a temporary employment agency provides a client with an employee. Within this relationship, two contracts would exist, namely the commercial contract between the agency and the client, and the employment contract between the agency and the employee. Furthermore, s 198 determined that the worker was in fact the employee of the labour broker and that the labour broker would be that employee's employer. One can argue that this designation of one true employer was necessary due to the confusion created by the multiple authority figures.

Section 198 continued by providing for the joint and several liability of the labour broker and the client, limiting such liability to circumstances where the labour broker failed to comply with a collective agreement or arbitration award regarding the employee's terms and conditions, or when it acted in

<sup>10</sup> Section 21(1), which reads: 'All persons shall have the right to . . . (j) practise any profession, or carry on any occupation, trade or business. (2) The fundamental freedoms referred to in Sub-Article (1) hereof shall be exercised subject to the law of Namibia, in so far as such law imposes reasonable restrictions on the exercise of the rights and freedoms conferred by the said Sub-Article, which are necessary in a democratic society and are required in the interests of the sovereignty and integrity of Namibia, national security, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.'

<sup>11</sup> *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia* 2011 (32) ILJ 205 (NmS) para 118.

contravention of a provision of the BCEA or the Wage Act 5 of 1957.<sup>12</sup> Finally, s 198 made various provisions with regard to the involvement of bargaining councils.

However, obstacles have arisen, for which current labour legislation does not provide answers. It can be argued that the nature of the employment of those employees associated with labour brokers falls within the ambit of the definition provided by s 213 of the LRA, thereby granting them true employee-status. As such, they are in fact entitled to all the labour rights generally bestowed upon employees by various pieces of labour legislation. They are also recognised as employees of the labour broker by s 198 of the 1995 LRA.

Nevertheless, the atypical nature of the relationships involved with the triangular employment relationship may have sometimes made it difficult for the above-defined employee to enforce these rights, and have even made it easy to deny him or her of these rights.<sup>13</sup> This fact was confirmed in the Regulatory Impact Assessment ('RIA') compiled for the Department of Labour after the Labour Relations Amendment Bill of 2010 had been drafted.<sup>14</sup> These sort of employees received smaller salaries than their permanent counterparts and, at times, may have been subjected to less favourable terms and conditions.<sup>15</sup> Indeed, in the absence of restrictive provisions, labour brokers attempted to refuse temporary employees their labour rights by identifying them as independent contractors within the triangular 'employment' relationship, thereby excluding them from the protection of labour legislation and effectively avoiding the responsibilities of an employer.

These cases are described as 'disguised employment'.<sup>16</sup> The ILO used this term in 2006 in its Employment Relationship Recommendation. In terms of s 4 of this instrument, the ILO places an obligation on its member states to combat disguised employment relationships that are used as a method to hide the true nature of a particular person's status and to avoid having to comply

<sup>12</sup> The Wage Act no longer exists, as the provisions it contained were incorporated into the BCEA.

<sup>13</sup> Paul Benjamin 'An accident of history: Who is (and who should be) an employee under South African labour law?' (2004) 25 *ILJ* 790; S W Mills 'The situation of the elusive independent contractor and other forms of atypical employment in South Africa: Balancing equity and flexibility?' (2004) 25 *ILJ* 1208; Geldenhuis op cit note 1 at 268.

<sup>14</sup> Paul Benjamin, Haroon Borhat & Carlene van der Westhuizen *Regulatory Impact Assessment of Selected Provisions of the: Labour Relations Amendment Bill 2010, Basic Conditions of Employment Amendment Bill 2010, Employment Equity Amendment Bill 2010 and Employment Services Bill 2010*. A Report prepared for the Department of Labour and the Presidency (2010) at 14, 16.

<sup>15</sup> *Ibid* at 17, 18. Examples of such less favourable terms are among others a lack of access to benefits such as medical-aid, pensions and maternity leave. It is also possible that these employees do not enjoy access to training.

<sup>16</sup> NEDLAC 'Code of good practice: Who is an employee?' (2007) 28 *ILJ* 101.

with labour law rules and the liability for contravening it.<sup>17</sup> This situation arose in *Mandla v LAD Brokers*,<sup>18</sup> where the labour broker alleged that a temporary employee was an independent contractor after the employee claimed to have been unfairly dismissed. The contractor would not be given a labour-law remedy should this be true. Fortunately, upon applying the common-law tests for an employment relationship, the court found that this worker was in fact an employee of the labour broker. As a result, the court held that he was unfairly dismissed and awarded him compensation equal to twelve months' remuneration. Basson J stated that the real relationship should be gathered from the contract as a whole and the realities of the relationship created thereby.<sup>19</sup> In my opinion, this would make it quite easy to ascertain whether a situation of disguised employment exists.

Furthermore, in terms of the commercial contract, temporary employees suffered from a lack of job security in light of the fact that the client could have the power to terminate the contract entirely and/or let go of the employee on short notice. However, as the labour broker is the employer, the *labour broker* would actually be responsible for dismissing the employee as a result of the terminated commercial contract (and the one upon which the employment contract might be based). In order to avoid this responsibility, labour brokers sometimes include a resolutive clause in the employment contract. This clause would state that the employment contract would terminate automatically in the event that the client terminated the commercial contract entirely and/or removes the employee from his or her service before the period of the commercial contract has lapsed.<sup>20</sup> By doing so, the employment contract would be terminated by operation of contract law rather than by the labour broker, depriving the employee of the right to challenge the fairness of the termination of his or her employment.

*SA Post Office v Mampeule*<sup>21</sup> and *NAPE v INTCS Corporate Solutions*<sup>22</sup> are among several cases where the courts considered such automatic terminations, and concluded that the operation of the resolutive clauses in the respective employment contracts were not fair. In each case, the relevant court held that in situations such as these, the operation of the resolutive clause is against public policy as it strips the employee of his or her labour

<sup>17</sup> Section 4(b) of the ILO's Employment Relationship Recommendation of 2006.

<sup>18</sup> *Mandla v LAD Brokers (Pty) Ltd* (2000) 21 ILJ 1807 (LC).

<sup>19</sup> *Ibid* para 41.

<sup>20</sup> Craig Bosch 'Contract as a barrier to "dismissal": The plight of the labour broker's employee' (2008) 29 ILJ 814; Tamara Cohen 'Placing substance over form — Identifying the true parties to an employment relationship' (2008) 29 ILJ 873; W J Hutchinson 'Are the provisions of section 189 of the LRA applicable to temporary employment services?' (2007) 28 ILJ 90; Suzanna Harvey 'Labour brokers and worker's rights: Can they co-exist in South Africa?' (2011) 128 SALJ 109; I Lawrence & J Moodley 'Automatic job termination gets the thumbs down' (2011) 9 *Without Prejudice* 67.

<sup>21</sup> *SA Post Office v Mampeule* 2009 (8) BLLR 792 (LC) para 46.

<sup>22</sup> *NAPE v INTCS Corporate Solutions* 2010 (31) ILJ 2120 (LC) paras 70, 77, 85.

rights. In *Mahlamu v CCMA*,<sup>23</sup> the court was of the same opinion, but Van Niekerk J added that these unacceptable situations should not be confused with legitimate cases such as the automatic termination of a fixed-term contract.

The atypical nature of these employees' employment also had a direct impact on such employees' ability to bargain collectively. Trade unions found it difficult to represent temporary employees for various reasons. Due to the employees' smaller numbers that are spread over a wide area, the trade unions found it difficult to reach them and may also have had trouble accumulating sufficient representivity within a particular workplace to be able to be entitled to particular organisational rights. Moreover, even if the trade union was able to achieve the required representivity within a specific client's workplace it might not have been able, in any event, to exercise any organisational rights with regard to the client's premises. The reason for this is that the trade union should have sought to exercise organisational rights from the employer of the relevant employees. In this case, the employer would be the labour broker.<sup>24</sup> The labour broker, however, had no right to allow a trade union organisational rights connected to the client's premises, even though these premises constituted the employees' physical workplace. It is important to note further that even if a trade union already had organisational rights with reference to the client's permanent employees, those rights would not necessarily be recognised by the client for purposes of representing the temporary employees, as they were not considered to be an actual part of the client's workforce.

The final obstacle experienced with labour brokers relates to the labour broker's employer status.<sup>25</sup> As employer, the labour broker is liable for the infringement of the employee's rights and any unfair labour practices as regards the employee. Nevertheless, when considering the composition of the triangular employment relationship, it may be impractical to hold the labour broker responsible. Since the labour broker has little or no control over the circumstances of the employee's actual work or place of work, the termination of the commercial contract on which that work is based, and/or the treatment of the employee on the client's premises, it seems unjustified to expect the labour broker to be responsible for unfair conduct in relation to these aspects, despite the fact that legislation designates the labour broker as the legal employer. As mentioned above, s 198(4) of the 1995 LRA provided for circumstances where the labour broker and the client could be held jointly and severally liable. However, as the employer, the labour broker

<sup>23</sup> *Mahlamu v CCMA* 2011 (4) BLLR 381 (LC) para 23.

<sup>24</sup> Benjamin, Borat & Van der Westhuizen *Regulatory Impact Assessment* op cit note 14 at 48–9.

<sup>25</sup> See *Crown Chickens t/a Rocklands Poultry v Rieck* 2007 (28) ILJ 307 (SCA) para 28. The court held that an employee can only have one employer at any time, which is the person with whom he has a contractual employment relationship, regardless of whether he performs his contractual obligations for someone else. In effect, this would mean that the labour broker would be the true employer.



would be sued first, after which the client could be held liable if the labour broker did not comply with the court's order. This caused confusion on the part of employees because the party he or she should hold liable for the infringement of his or her rights was not the party to whom he or she reported. There was therefore some uncertainty as to the various responsibilities of the authority figures.

It is clear from the above that various obstacles existed where labour brokers were concerned. In order to promote legal certainty, rules regarding the organisation of labour brokers and how the triangular employment relationship should be managed needed to be developed. This is what Parliament attempted to accomplish with its amendments to labour legislation. These amendments will now be addressed.

### III AMENDMENTS TO THE LABOUR RELATIONS ACT

Over the past few years, the National Economic Development Labour Council ('NEDLAC') has attempted to amend the current South African labour legislation, paying special attention to labour brokers and the employees involved. Accordingly, the LRA, BCEA and EEA were placed under the microscope.

In December 2010, the Minister of Labour published proposed amendments to various labour acts in the Government Gazette for the first time. Here the minister expressed the intention to submit these proposals to NEDLAC for consideration.<sup>26</sup> In the meantime and at the request of the Cabinet, the RIA was drawn up in order to provide a critical analysis of the amendments proposed.<sup>27</sup>

The most important proposals in the Labour Relations Amendment Bill of 2010 entailed a change to the definition of an employee, having the effect that only a worker who performed tasks for an employer, who directly controlled and supervised such worker's performance, would be classified as an employee. However, given that the employee of a labour broker (who is the designated employer in this relationship) does not perform his or her duties under its control (but rather under the control of the client) he or she would no longer be considered an employee. Consequently, the particular worker again would not have been afforded the protection guaranteed to all employees under labour legislation.<sup>28</sup>

The other proposed amendment was two-fold, practically banning labour brokers and the provision of temporary work, first by repealing the existing s 198 of the 1995 LRA (which regulated labour brokers to some extent) and, secondly, by suggesting the addition of s 200B, which proposed that an employee should be employed indefinitely, unless the employer could establish a justification for employment on a fixed — or in this case

<sup>26</sup> GN 1112, GG 33873 of 2010.

<sup>27</sup> Benjamin, Borat & Van der Westhuizen *Regulatory Impact Assessment* op cit note 14.

<sup>28</sup> Ibid at 34–5.



temporary — term. This proposed amendment was severely criticised, inter alia on the basis that it would cause large numbers of job losses and unemployment, limited flexibility and stability in the labour market, and would impose an increased administrative burden on employers.<sup>29</sup>

Shortly after the proposals were made public, the Labour Relations Amendment Bill of 2010 was withdrawn. This decision was influenced greatly by the RIA. In early 2012, the Minister of Labour presented the new proposed amendments to the Cabinet Committee. Later that same month, the Cabinet approved the amendments for submission to Parliament. At that stage, the proposals would be scrutinised by the Portfolio Committee before it could be submitted to the National Assembly and the National Council of Provinces for adoption.<sup>30</sup> By February 2013, the proposed amendments were still open for public debate. In March 2013, it was reported that the possibility of a redraft of the current proposals existed, which led to last-minute proposed amendments to the limited duration of triangular employment relationships.<sup>31</sup> Finally, in August 2013, Parliament adopted the Labour Relations Amendment Bill of 2012.

In general, the LRA amendments place additional duties on labour brokers as employers, with the aim to protect the employees from possible exploitation. The joint and several liability of the authority figures is also outlined more clearly than in s 198 of the 1995 LRA, thereby attempting to remove confusion or uncertainty in this regard. A very important inclusion in the amendments has regard to the employer status of the client under specific circumstances.<sup>32</sup>

The relevant amendments contain a wide variety of new provisions applicable to labour brokers and the employees concerned. The first amendments have a direct impact on trade unions and the allocation of organisational rights in order to represent labour broker employees. Section 21 of the 1995 LRA is adjusted by adding subpara (v) to para (b) of subsec (8). This addition determines that if a dispute with regard to organisational rights arises within a specific workplace, the Commissioner should take the composition of the work force into account, including the degree to which the work force are represented by atypical employees. Atypical employees in this context refer to fixed term and part-time contracts, as well as employees provided by labour brokers. It is clear from this addition that it is the legislator's intention to confirm labour broker employees' future involve-

<sup>29</sup> Ibid at 34–40.

<sup>30</sup> Minister of Labour 'Media statement: New amendment bills on the Labour Relations Act and the Basic Conditions of Employment Act' available at <https://www.labour.gov.za/media-desk/media-statements/2012/media-briefing-by-minister-of-labour-on-the-bills-amending-the-labour-relations-act-and-the-basic-conditions-of-employment-act>, accessed on 27 November 2012.

<sup>31</sup> See the amendment to s 198A(1)(a) referred to in the text to note 35 below.

<sup>32</sup> P A K le Roux 'Amendments to the Labour Relations Act part 1: Proposed changes on unfair dismissal, non-standard employment, strikes and lockouts' in A Freund, P A K le Roux & C Thompson *Current Labour Law* (2012) 129–38.

ment in collective bargaining.<sup>33</sup> This could also have an effect on a trade union's total representivity, as the size of the total workforce will depend upon whether the atypical employees are considered a part thereof, for these purposes. The representivity of the trade union therefore, will be based on the number of employees it represents in relation to the total number of employees in that particular workforce. The larger the workforce, the smaller the percentage of employees the trade union represents.

Another fundamental amendment with regard to organisational rights is found in s 21(12). Subsection 12 makes specific provision for the allocation of organisational rights to a trade union who wishes to represent labour broker employees. According to this subsection, should a trade union wish to exercise organisational rights in order to promote its effectiveness towards labour broker employees, it may seek to exercise these rights on the premises of either the labour broker or the client, depending on where the employees are at a given moment. In theory, this new provision should decrease trade unions' antagonism toward labour brokers, as it enables trade unions to reach and recruit labour broker employees more easily. In order to prevent any confusion or loopholes in this regard, subsec 12 contains the following sentence:

'If it [the trade union] exercises rights in a workplace of the temporary employment service, any reference in Chapter III to the employer's premises must be read as including the client's premises.'

Section 22 of the LRA is also amended by the addition of subsec 5. This subsection states that any arbitration award made with reference to organisational rights shall be binding not only on the employer, but also on any other third party, such as the client of the labour broker, whose rights may be affected by such award. It is however required that the third party is granted the opportunity to participate in the arbitration proceedings.

In so far as the 1995 LRA specifically provided for labour brokers in s 198, material amendments have been made to chap 9 of the Act. Their purpose is to reduce labour broker employees' vulnerability and to remove any uncertainty that might exist. It is evident from the proposed amendments that the legislature attempts to maintain a delicate balance between the need for protection of the employees involved and the prolonged existence of flexibility in the labour market (one of the main reasons for the incorporation of this type of atypical employment in the labour market in the first place). The needs of all the parties concerned are addressed to some extent.

The 1995 LRA definition of labour brokers indicated that such brokers are entities which provide a person to a client for the delivery of a service to that client, or to perform a specific piece of work for that client. The Amendment Act indicates that the phrase 'delivery of services' is to be removed from s 198, in order to eliminate any confusion regarding the nature of the work

<sup>33</sup> Department of Labour 'Memorandum of objects: Labour Relations Amendment Bill' (2012) 2.

done by the employee. It should be clear from the phrasing that the employee is not employed by the client (a deduction that might have been made from using the word 'service'), but rather only temporarily placed under the control of the client to do work of some sort. By stating that a person delivers a service to another suggests the existence of an employment contract between the parties — which does not ring true in the case of a client and a labour broker employee.

The legislature also decided that s 198(4) should be expanded to create better clarity on the duties of the authority figures involved in the triangular employment relationship. This will be achieved by the addition of subsecs 4A to 4F to the current s 198. Subsection 4A(a) mainly pertains to the joint and several liability of the client. In terms of this provision, the employee may institute any action either against the labour broker or the client, or even both, should the employee so desire. Also, subsec 4A(b) goes on to determine that a labour inspector may enforce the provisions contained in the BCEA against either of the two authority figures or both concurrently. In connection with the previous paragraph, subsec 4A(c) provides for orders in this regard. Any orders, with regard to the compliance of the provisions as set out in the BCEA against one of the mentioned parties, may also be enforced against the other.

Subsections 4B and 4C respectively determine that the labour broker has the obligation to provide the labour broker employee with a written employment contract containing all relevant provisions for the placement of the employee with a client (which obligation applies, three months after the commencement of the Amendment Act, to labour broker employees employed before the commencement of the Amendment Act) and a labour broker employee may not perform work for a client under terms and conditions inconsistent with labour legislation, sectoral determinations or collective agreements. Subsection 4D provides that the question whether a specific labour broker employee is covered by a bargaining council agreement or collective agreement, should be answered with specific reference to the particular sector of the client to whom the employee is performing work.

In connection to the last-mentioned subsection, subsec 4E determines that the Labour Court or an arbitrator may determine in any proceedings brought forth by the temporary employee whether the provisions contained within the employment contract or commercial contract complies with subsec 4D. These authorities also have the right to make any order or award to resolve the issue.

Finally, subsec 4F determines that no temporary employment agency may conduct business as such if it is not registered under the appropriate legislation. It is made clear that the absence of the required registration cannot be used as a defence for not complying with s 198 or s 198A.

Section 198A, referred to above, along with ss 198B, 198C and 198D, are added to the original s 198 and are aimed at providing for atypical employees. This section applies only to employees who earn salaries below the threshold

as determined by the Minister of Labour in s 6(3) of the BCEA.<sup>34</sup> Section 198A provides for employees of temporary employment agencies. On the other hand, s 198B pertains to employees with a fixed-term contract. Finally, s 198C is to protect part-time employees. Section 198D contains general provisions applicable to ss 198A to 198C. For purposes of this contribution, attention will be paid only to ss 198A and 198D.

Section 198A(1) indicates that the term 'temporary services' refers to (a) work performed by an employee to a client for a period not exceeding three months,<sup>35</sup> (b) as a substitute for an employee of the client who is temporarily absent, or (c) in a category of work and for any period of time which is determined to be temporary services in a collective agreement concluded in a bargaining council, a sectoral determination or a notice published by the Minister of Labour. According to para (a) of s 198A(3), a temporary employee who complies with this criteria will be considered the employee of the temporary employment service. On the other hand, para (b) creates an exemption in this regard, by indicating that should an employee not meet the criteria mentioned in s 198A(1), the client would be deemed to be the employer of the employee for an indefinite period.<sup>36</sup> The inclusion of this provision is aimed at limiting the potential for exploitation of labour broker employees by the labour broker's clients, given that the 1995 LRA considered labour brokers as the employers for the duration of the triangular employment relationship, allowing clients to avoid restrictive labour legislation and some employer responsibilities.

To prevent the avoidance of the new employer responsibility of the client by the removal of the employee before three months have lapsed, s 198A(4) regards this sort of removal as a dismissal.

Section 198A(5) stipulates that should the employee be considered as the employee of the client in terms of para (b) of s 198A(3), he or she may not work for the client under terms and conditions which, on the whole, are less favourable than those of the client's permanent employees. In this instance, the provisions in the EEA relating to remuneration and equal treatment will be relevant. At the same time, however, the subsection recognises the possibility of differentiation, but only if valid grounds for such differentiation could be proved. Such grounds are indicated in s 198D(2) and include seniority, experience, period of service, merit, and the quality of the work performed.

Section 198A(9) continues to indicate that the rights granted in subsecs (3), (4) and (5) of s 198A will be acquired only from three months after the commencement of the Amendment Act, by employees provided to or

<sup>34</sup> At the time of writing R205 433.30, instituted in July 2014.

<sup>35</sup> Initially this subsection indicated that the period may not exceed six months. However, Parliament reduced the period to three months due to pressure from trade unions to limit the use of labour brokers.

<sup>36</sup> This determination is to be subject to the provisions in s 198B.

procured for a client by a temporary employment service before the commencement of the Act.

Section 198D finally identifies the forums to which disputes arising from ss 198A to 198C can be referred. A commissioner or bargaining council can be approached for conciliation. Should this prove to be unsuccessful, the dispute may be referred for arbitration.

Only a few amendments to the BCEA were made as far as the regulation of temporary employment services is concerned. The Basic Conditions of Employment Amendment Act 20 of 2013 contains an addition in the form of s 33A. In terms of this section, an employer is prohibited from receiving payment from the employee for the allocation of work. Accordingly, this provision effectively prohibits temporary employment agencies from requiring a fee from the temporary employee for the placement of said employee with a client. This will be considered a criminal offence.

The only other amendment to the BCEA which could be applied to the temporary employee's situation is found in s 55. The addition of subsec 8 allows the Minister of Labour to make an 'umbrella' sectoral determination which would cover all employers and employees who are not yet bound by another determination.

Apart from abovementioned legislation, the Employment Services Act 4 of 2014 ('the ESA') was also introduced to make specific provision for the regulation of public and private employment agencies. Chapter 2 of the ESA mainly focuses on private agencies, and is aimed at providing job seekers with work opportunities. This is similar to the purpose and approach of labour brokers. In terms of the Bill, it is required of private employment agencies to register at the designated Registrar before they can do business as such. At this registration a certificate will be issued, confirming that the registration was successful.<sup>37</sup>

Sections 14 and 15 of the ESA respectively contain a set of proposed rules regarding certain administrative conduct that the agency may not commit, and the general prohibition on receiving a fee from the employee for the allocation of work. The latter-mentioned could also include any deductions from the employee's salary to that effect. However, under certain circumstances, the Minister of Labour may make an exception. Sections 16 and 17 of the ESA provide for the methods of retaining information of the employee by the agency, as well as respecting the confidentiality of that information. This is aimed at protecting the employee's right to privacy. Should the agency contravene a provision of this proposed Act in any way, or fail to honour its obligations as stipulated, the Minister of Labour may withdraw that particular agency's registration certificate. The agency would reserve the right to have the decision of the Minister of Labour reviewed by the Labour Court.

<sup>37</sup> Section 13 of the ESA.

#### IV A COMPARATIVE OVERVIEW

As mentioned above, the Namibian Labour Amendment Act of 2012 came into effect in August 2012. In this Act, s 128 is rewritten to contain regulatory provisions. This section, as it originally appeared in the Namibian Labour Act of 2007, previously prohibited the use of labour brokers. Section 128 now provides for a definition for temporary employment agencies, much like the one provided for in the 1995 LRA.

The provisions contained in the Namibian legislation with regard to labour brokers are, judged overall, much more limited than those contained in the Amendment Act of South African law. Even so, it should be noted that the Namibian Labour Amendment Act contains aspects regarding labour brokers that do not feature in the South African instruments. First, the most noteworthy difference between the Namibian and South African instruments concerns the identity of the employer. The 1995 LRA designated the labour broker as the employer for the duration of the triangular employment relationship, even though it is inconceivable to conclude that a true employment relationship exists between the labour broker and the employee. The employment contract creates a fictional employment relationship between these two parties, while the reality of the triangular employment relationship indicates that the relationship between the employee and the client is one which has a much closer resemblance to a true employment relationship. Changing the legal position by considering the client as the employer and thereby effectively ending the existence of the triangular employment relationship and the benefits it may have, may be far more detrimental, as was seen in the RIA.<sup>38</sup>

Before the introduction of the Namibian Labour Amendment Act, Namibia also considered the labour broker to be the employer. In the new s 128, however, it is stated clearly that the client would be considered to be the employer of the temporary employees. In contrast, the South African government remains convinced that the labour broker should be the employer, at least for the first three months, as in the LRA amendments indicate.

In light of the provision regarding the client's employer status in the Namibian legislation, it did not seem necessary to include additional provisions regarding specific rights of the employees or the responsibilities of the authority figures, as is the case in the South African law. The Namibian client would have all the traditional employer responsibilities provided for by the new s 128(2).<sup>39</sup> In turn, the employees would also have more or less the

<sup>38</sup> Benjamin, Borat & Van der Westhuizen op cit note 14 at 34–40.

<sup>39</sup> It is worth noting that Africa Labour Services brought a case before the High Court of Namibia against the Namibian Government after the new Act came into force, claiming that the new s 128 is unconstitutional. They claimed that regarding of the user enterprise as the employer effectively banned labour brokers. This was probably because employers no longer wished to make use of labour brokers as the flexibility and other benefits that they had in store, no longer existed. Therefore,

same rights and benefits as the client's permanent employees, as the client has the obligation not to subject these employees to terms and conditions which, on the whole, are less favourable than those of its permanent employees who perform the same or similar work. Although it seems as if the client would accumulate all employer responsibilities, s 128(10) allows the Ministry of Labour to issue regulations with regard to the responsibilities of the client or the labour broker. Furthermore, if gaps are to be found in the regulations, the Ministry can address these without having to subject the labour legislation to another amendment process.

One can argue that the Namibian provision regarding the client's employer status is sensible. When analysing the triangular employment relationship, it would seem that the client should be considered the true employer, as it is the client who exercises control over the employee, and it is the client to whom services are provided. The client is also responsible, for the most part, for providing the tools of the trade and regulating the employee's working hours. It can be argued that the employee forms part of the client's organisation, as the employee provides his or her personal services to assist the client in carrying on or conducting its business for the duration of the triangular relationship and (most probably) he or she must also comply with the policies of the particular business. Such an employee further works side by side with the client's permanent employees towards achieving a joint goal. Finally, even though the agency is the party remunerating the employee, the said remuneration is paid from the fee which the agency receives from the client for the employee's services. In a sense, the employee is economically dependent on the client as he or she probably would not have received the remuneration if the client did not pay the fee.<sup>40</sup> Therefore, from a common-law perspective (when applying the common-law tests),<sup>41</sup> the client is the employer and as employer, would be held accountable for all the traditional employer duties.

On the one hand, identifying the client as the employer has its advantages. The legislation will reflect the reality of the circumstances as described above. This will create legal certainty and will moreover remove the earlier stated impractical obligations that rest on the labour broker as employer. The

s 128 indirectly infringed on ALS's constitutional right to conduct their business of choice. In June 2013, Geier J found that s 128 was not irrational and was not so invasive on labour brokers' constitutional right to conduct their business that it should be regarded as an impermissible material barrier to the companies' conduct of their business. See *Africa Labour Services v The Minister of Labour and Social Welfare* [2013] NAHCMD 179 and W Menges 'Namibia: Labour hire law survives challenge' available at <http://allafrica.com/stories/201306280755.html>, accessed on 20 September 2013.

<sup>40</sup> This would not have been the case in the UK law. According to s 15(b) of the Conduct of Employment Agencies and Employment Businesses Regulations, 2003, the agency has the obligation to pay the employee's remuneration, whether the client has paid its fee to the agency for that employee's services or not.

<sup>41</sup> The control, organisation, dominant impression, and economic tests, respectively.



temporary employees will be entitled also to terms and conditions comparable to those of permanent employees, with a resulting higher degree of job security as the client will now have the duty to comply with strict dismissal rules and procedures in relation to temporary employees too.

On the other hand, considering the client as the employer could prove to be detrimental. The main purpose of using temporary employment services is to maintain a degree of flexibility in the workplace, allowing employers to use a specific employee only for the period which he or she is needed. Examples of situations such as these would include circumstances where a labour broker employee was needed to fill in for a permanent employee who was on maternity leave or sick leave. In addition, there may be cases where the business of the employer is seasonal in nature, so that the employer needs certain employees for specific months of the year only. These services would be provided ideally in terms of the commercial contract between the client and the labour broker, and the employment contract between the labour broker and the employee. When the employee's services are no longer needed, or the client wishes to return the employee to the agency for whatever reason, the client could request the agency to take the employee back.<sup>42</sup> The employee would then 'return' to the agency. As discussed earlier, although the commercial contract might come to an end under these circumstances,<sup>43</sup> this would not necessarily terminate the employment contract, which means the employee is not dismissed in the true sense of the word.<sup>44</sup> The result is that the client could 'terminate' the employee's services without having to comply with strict dismissal regulations.

Should the client be regarded as the employer, it would defeat the purpose of promoting flexibility, as the client would need to comply with all labour legislation, observe all employer duties, and may dismiss the employees only in terms of restrictive labour legislation. The flexibility of the client's business, as well as that of the labour market as a whole, will decrease. The limited flexibility will also cause job losses; especially when taking cognisance of the fact that the client will now have to remunerate all employees equally (for the same work done) and as a result, may employ fewer employees. By contrast, by expressly identifying the labour broker as the statutory employer (as is the case in the South African law) a flexible labour market can be

<sup>42</sup> It is also possible that the client and the agency could determine the duration of the contract beforehand. This would then resemble a fixed-term contract, which would end by way of operation of law. However, this does not always occur.

<sup>43</sup> This is especially so in cases where the commercial contract is concluded for the placement of a specific employee. However, should the commercial contract have been concluded for the placement of any employee, one such employee could therefore only replace the other (if the client so wished), leaving the commercial contract intact.

<sup>44</sup> The agency can immediately place the employee under a new client's services, or it can terminate the employee's employment contract, in which case it has to uphold the employee's right not to be unfairly dismissed.

maintained, and current jobs will hopefully remain intact. In this instance, therefore, the Namibian provision is not an option for South Africa.

Nevertheless, the possibility of exploiting the labour broker's employer-status should be limited. In my view, s 198A(1) of the amended LRA, which provides for situations under which the client will be deemed the employer, has the potential of preventing such exploitation. For example, by deeming the client to be the employer after the temporary employee has been working for the client for three months, strikes a balance between the need for flexibility in the labour market and the protection of temporary employees against exploitation and long term vulnerability.

Notably, when the client becomes the employer in the South African context (for example after the period of three months has lapsed), it has the obligation to present the temporary employee with terms and conditions that on the whole, are not less favourable than those of its permanent employees. This would include the payment of sufficient wages. Should the temporary employee perform the same or similar work of a comparable permanent employee, they should be paid more or less the same salary. But this 'doctrine of proportionality' only takes effect after three months. Within the first three months of employment, the authority figures are free to pay the employee an amount they deem fit. South African law does not currently provide for a minimum wage for these employees. However, with the commencement of the Namibian Labour Amendment Act, the problem regarding inadequate salaries in Namibia might be resolved, given that the temporary employee is considered to be the employee of the client from the first day. In terms of s 128(3) of the Act, the temporary employee performing work for a client ought to receive all the rights and obligations that an average employee could expect to obtain from his or her employer.<sup>45</sup> This provision is based on the fact that under the new legislation, no distinction may be drawn between a temporary and a full-time employee of a particular client, and that each employee should be treated equally. This entails that temporary employees may not receive terms and conditions that on the whole, are less favourable than those of the client's permanent employees performing similar work, as is confirmed by s 128(4) of the Act.<sup>46</sup> All the basic employment conditions, the right to health and safety in the workplace and the protection against unfair dismissal now expressly apply to these employees. Equal terms and conditions would include comparable wages being payable to the temporary employees.

In order to maintain the economic flexibility which labour brokers can provide in South Africa, it is not suggested that temporary employees should be remunerated on the same scale as permanent employees from the first day of their employment as is the case under Namibian law. By providing temporary employees with comparable wages only after three months, it allows the client to be more cost effective in relation to truly temporary

<sup>45</sup> Section 128(3) of the Namibian Labour Amendment Act of 2012.

<sup>46</sup> Section 128(4) of the Namibian Labour Amendment Act of 2012.

services. That said, provision should be made for temporary employees at least to receive an adequate living wage within the first three months. This could be done perhaps by way of providing for a suitable minimum wage in terms of a sectoral determination.

South African labour legislation, even after the Amendment Act, does not contain restrictive provisions limiting the possibility of identifying the temporary employee as an independent contractor in order for the labour broker to avoid employer responsibilities. In fact, s 198(3) of the 1995 LRA recognises the possibility that the 'temporary employee' may perform work as such an entity. However, under these circumstances the 'temporary employee' is a true independent contractor and the relationship concerned indeed reflects his or her identity as such. It is commonly accepted that such situations could arise legitimately, but labour brokers and clients take advantage of it by identifying the employee as an independent contractor in form to reap the benefits thereof, when in substance they continue with an employment relationship. Section 198(3) should not be interpreted in a manner that would allow for this misuse; parties should not be allowed to avoid their responsibilities. Nevertheless, in the absence of regulations in this regard, it is up to the South African courts to adjudicate these circumstances sensibly as they arise.

Likewise, Namibian labour legislation does not provide for a limitation in this instance. It does not contain anything within its new promulgated framework prohibiting a labour broker or client from attempting to avoid its duties. On the contrary, the Namibian Labour Amendment Act makes it possible for a client to be acquitted from his employer status with the consent of the other parties. However, the acquittal will not relieve the client of liability arising from the contravention of any provision in s 128 of the Act. In cases such as these, the labour-hire agency and the client will still be held jointly and severally liable.<sup>47</sup>

Although Namibian labour legislation does not contain a provision which prohibits the authority figures from characterising the temporary employee as an independent contractor in order to avoid their responsibilities, it does include the next best thing. Section 128A of the amended legislation aims to resolve the uncertainty with regard to the identity of the employer, and the identity and rights of the employees. As is the case with s 200A of the LRA and s 83A of the BCEA, s 128A of the amended Namibian Labour Act provides a list of factors that could assist with the identification of an employment relationship in cases as described above, with a view to determining whether the temporary employee is in fact an employee or an independent contractor. This provision is concerned with protecting temporary employees who find themselves in an ambiguous or disguised employment relationship. The leading factors in this regard are control, economic dependence, that the person should form an integral part of the organisation

<sup>47</sup> Sections 128(8) and 128(9) of the Namibian Labour Amendment Act of 2012.

within which he or she is providing a service, and that he or she should have worked for the same client for the past three months at 20 hours per month.<sup>48</sup> Should one or more of the mentioned factors be present within a given situation, it can be concluded that the worker is in fact a true employee, irrespective of the nature of the contract.

Sections 128B and 128C have also been added to the Namibian Labour Act. The first-mentioned section gives the Minister of Labour and Social Welfare the authority, after consulting with the Labour Advisory Council and by notice in the Gazette, to deem any worker who is party to a specific relationship an employee in order to afford that person the protection provided by labour legislation. An essential amendment to the Act can be found in s 128C, which states that all employees, even those with a fixed-term contract, are considered to be in an employment relationship of indefinite duration, unless the employer can provide a valid reason why the employee should be classified as temporary. An example of this could be where the person was employed for the purpose of assisting the employer with a specific temporary project, or the employee's services were needed only during seasons of high production demands.

To some extent, s 128C of the Namibian Labour Amendment Act is similar to s 198B of the amended LRA, which specifically provides for fixed-term employees. However, s 198B(3) approaches the issue from a different angle. From this section, it is obvious that the legislature prescribes that true fixed-term contracts may not exceed a period of three months. It determines that such contracts may legitimately exceed this period only if the nature of the work is in fact limited or of a definite duration, or if the employer can provide an adequate reason why the term of the contract should be fixed. Section 198B(5) goes on to state that should a fixed-term contract be concluded or renewed in contravention of subsec 3, the contract would be deemed to be of indefinite duration.

With regard to the job security of temporary employees in South Africa, there are no express legal limitations which prohibit the possibility of including a resolutive clause within the employment contract in order for the labour broker to avoid liability for unfair dismissals. A complete ban of such clauses would be disproportionate, as legitimate uses for such clauses do exist. Labour brokers should be allowed to use such clauses in cases where the employment contract between them and temporary employees are actual fixed-term contracts in substance, and also where they are used for the purpose for which they were designed. Although on occasion, courts have concluded that the use of these clauses merely to avoid strict dismissal rules and procedures are against public policy and should not be condoned, it would be wise to prevent the illegitimate use of such clauses altogether. This would be particularly in cases where the nature of the contract *does not* justify the use of resolutive clauses, such as contracts which are not inherently of a

<sup>48</sup> Section 128A of the Namibian Labour Amendment Act of 2012.

fixed duration. The amended LRA includes a section stating that no provisions may be inserted in an employee's employment contract which is in direct contravention of other labour legislation.<sup>49</sup> One could argue that this stipulation *might* be made applicable to the resolutive clause excluding the employee from challenging a dismissal, but this is a far cry from a solution.

In relation to Namibian law, the client is the employer. As such, one could expect that the normal labour rules apply, making the client directly liable for any unfair dismissal. It might not be possible therefore, to use a resolutive clause in the 'unacceptable' context as the triangular employment relationship in the Namibian framework has a different composition. Accordingly, the absence of a provision with regard to automatic terminations in the Namibian legislation in this regard is not peculiar.

As amendments are made to the LRA, specifically with regard to trade unions' representation of temporary employees and their right to seek organisational rights from both the labour broker and the client, it seems as if the major obstacles regarding temporary employees' right to collective bargaining is a thing of the past. The particular workplace of the employees and its influence on trade unions' ability to reach the employees, either for recruitment or meetings, is no longer a problem. This might also result in the enforcement of collective agreements to the temporary employees' benefit. Similarly, trade unions' antagonism towards labour brokers in Namibia also fell away in light of the new legislation. Trade unions expressed their approval for the new legislation, which now allows them to seek organisational rights from the client (the employer) in order to represent the employees on the client's premises. Temporary employees may therefore now join a trade union which is associated with the client's premises. Moreover, the temporary employee can now more easily bargain collectively for more favourable employment conditions, especially since the client has the power over said conditions.

I am of the view that the new South African approach, which allows the trade union to seek organisational rights from both authority figures, provides for better coverage where a temporary employee's right or ability to bargain collectively is concerned. In this context, the Namibian legislation does not provide for the periods when the employee is on the labour broker's premises, subsequently limiting their bargaining powers when they are not placed with a client. I appreciate the fact that temporary employees are at their most vulnerable and exposed to unfair labour practices when actually performing work for the client, but situations do arise where employees need representation when they are not placed with a client. By providing for both scenarios, the South African legislature offers employees the best protection possible.

<sup>49</sup> Section 198(4C) of the Labour Relations Amendment Act 6 of 2014.

As mentioned above, the amended LRA contains a wider variety of aspects relating to labour brokers than the Namibian Labour Amendment Act. However, the Namibian Labour Amendment Act contains numerous provisions which are not reflected in South African law. A very important provision included in the new s 128 of the amended Namibian Labour Act is the prohibition on the contracting and usage of temporary employees during or in anticipation of strikes and lock-outs. The provision goes further by stating that the use of temporary employees will also be prohibited within the first six months after large scale retrenchments in a particular business.<sup>50</sup> The new s 128 also identifies possible sanctions for the contravention of this provision. Such sanctions could also be imposed if the client distinguishes between its temporary and full-time staff without good cause. The sanctions referred to entail a maximum fine of N\$80 000 and/or imprisonment of up to two years.<sup>51</sup> Any alleged contraventions of the provisions in this section can be brought before a Labour Commissioner for arbitration.<sup>52</sup> These are rather interesting additions to the Namibian labour legislation, as they attempt to prevent the use of labour brokers for reasons other than for what they were designed. They also use penalties to ensure the compliance with the legislation by the parties concerned. The benefits that these provisions could bring to the 'labour market table' should be considered by the South African government.

In addition, Part IV of the Namibian Employment Service Act 8 of 2011, which is closely related to the South African ESA, has been promulgated by the Namibian government. While s 128 of the amended Namibian Labour Act mainly focuses on the protection of temporary employees, Part IV is more concerned with the regulation of labour hire services as juristic persons. In terms of this Act, the labour hire agency has to be registered at the Employment Service Bureau of the Ministry of Labour and Social Welfare before it may conduct business as such. It was required that the agencies should receive a licence for business from the mentioned bureau before 28 February 2013.

The Employment Service Act goes further, stating that labour hire agencies may not conduct business with the intention of making a profit. In terms of this Act, therefore, these agencies are prohibited from charging fees from the employees for any placement.<sup>53</sup> The most important provisions contained in this Act, however, entail the provision which determines that the agency may not discriminate in the placement of advertisements for temporary employees.<sup>54</sup> Furthermore, such employees may not be placed with a client before the client has guaranteed the labour hire agency that it will not subject a particular temporary employee to terms and conditions that

<sup>50</sup> Section 128(5) of the Namibian Labour Amendment Act of 2012.

<sup>51</sup> Section 128(7) of the Namibian Labour Amendment Act of 2012.

<sup>52</sup> Section 128(6) of the Namibian Labour Amendment Act of 2012.

<sup>53</sup> Section 24 of the Employment Service Act of 2011.

<sup>54</sup> Section 26(1) of the Employment Service Act of 2011.

on the whole, are less favourable than those of its full-time employees.<sup>55</sup> This Act also repeats the provision found in the amended Namibian Labour Act pertaining to the use of temporary employees during strikes.<sup>56</sup> To ensure that the provisions mentioned above are complied with, the Act provides for a maximum fine of N\$20 000 and/or imprisonment for a period up to two years in cases of contravention.<sup>57</sup>

## V CONCLUSION

Both the South African and the Namibian labour legislation are aimed at the protection of the employees within their respective labour markets, including the more vulnerable employees of labour brokers. However, each uses a different approach in order to achieve this goal. The Namibian legislature is of the view that recognising the client as the employer is the way to go, but as discussed above, although this approach has its advantages, it unduly limits the flexibility envisioned for the labour market. Accordingly, I am of the view that the South African amendments are more accurate in designating the labour broker as the employer. Nevertheless, the amendments could have been extended with regard to the parties' joint and several liabilities under various circumstances, thereby relieving the labour broker of some of the responsibility.

By considering the client as the employer in Namibia, many of the obstacles experienced with labour brokers seem to disappear, including aspects regarding the employee's job security, wages and the right to bargain collectively. Consequently, there was no need for a wider variety of regulations as are provided for by the South African amendments. In spite of the narrower framework of the amended Namibian Labour Act, it does however contain aspects which have the potential to be expedient in the South African labour market. For example, by providing for penalties for contraventions of the provisions in the amended s 198, a higher degree of compliance could be guaranteed and might even prevent costly disputes.

The Namibian Labour Amendment Act is still very young, and its long term effectiveness is unclear. Even so, it may have been useful to consider some of its provisions in the process of amending the South African LRA.

<sup>55</sup> Section 26(2)(a) of the Employment Service Act of 2011.

<sup>56</sup> Section 26(2)(b) of the Employment Service Act of 2011.

<sup>57</sup> Section 26(3) of the Employment Service Act of 2011.